



DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 2

[DOI-2022-0007; 223D0102DM, DLSN00000.000000, DS65100000, DX.65101]

RIN 1090-AB16

Privacy Act Regulations; Exemption for the Personnel Security Program Files System

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of the Interior (DOI) is proposing to amend its regulations to exempt certain records in the INTERIOR/DOI-45, Personnel Security Program Files, system of records from one or more provisions of the Privacy Act of 1974 because of criminal, civil, and administrative law enforcement requirements.

DATES: Submit comments on or before [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by docket number [DOI-2022-0007] or [Regulatory Information Number (RIN) 1090-AB16], by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for sending comments.
- Email: DOI_Privacy@ios.doi.gov. Include docket number [DOI-2022-0007] or RIN 1090-AB16 in the subject line of the message.
- U.S. mail or hand-delivery: Teri Barnett, Departmental Privacy Officer, U.S. Department of the Interior, 1849 C Street NW, Room 7112, Washington, DC 20240.

Instructions: All submissions received must include the agency name and docket number [DOI-2022-0007] or RIN 1090-AB16 for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Teri Barnett, Departmental Privacy Officer, U.S. Department of the Interior, 1849 C Street NW, Room 7112, Washington, DC 20240, DOI_Privacy@ios.doi.gov or (202) 208-1605.

SUPPLEMENTARY INFORMATION:

Background

The Privacy Act of 1974, as amended, 5 U.S.C. 552a, governs the means by which the U.S. Government collects, maintains, uses and disseminates personally identifiable information. The Privacy Act applies to information about individuals that is maintained in a “system of records.” A system of records is a group of any records under the control of an agency from which information about an individual is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. See 5 U.S.C. 552a(a)(4) and (5).

Individuals may request access to records containing information about themselves under the Privacy Act, 5 U.S.C. 552a(b), (c) and (d). However, the Privacy Act authorizes Federal agencies to exempt systems of records from access by individuals under certain circumstances, such as where the access or disclosure of such information would impede national security or law enforcement efforts. Exemptions from Privacy Act provisions must be established by regulation, 5 U.S.C. 552a(j) and (k).

The DOI Office of Law Enforcement and Security (OLES) maintains the INTERIOR/DOI-45, Personnel Security Program Files, system of records. This system

supports the DOI bureau and office Personnel Security Program functions to determine suitability, eligibility, and fitness for service of applicants for Federal employment and contract positions who require access to Departmental facilities and information systems and networks. The system also helps OLES manage a National Security Program to document and support decisions regarding clearance access to classified information and implement provisions that apply to Federal employees and contractors who access classified information or materials and participate in classified activities that impact national security, and ensure the safety, storage of classified information and security of Departmental facilities, information systems and networks, occupants, and users.

The Personnel Security Program Files system will contain records created and managed by DOI bureaus and offices to support personnel security activities and document evaluations and decisions regarding suitability, eligibility, and fitness for service of applicants for Federal employment and contract positions to the extent necessary to manage secure access to Departmental facilities, information systems and networks, and to manage access to classified information and reciprocity. These records may include information about individuals related to possible violations of Federal laws and regulations, potential incidents, investigations, and criminal activity. The system notice for INTERIOR/DOI-45, Personnel Security Program Files, system of records was last published in the *Federal Register* at 72 FR 11036 (March 12, 2007), modification published at 86 FR 50156 (September 7, 2021). An updated system of records notice was published elsewhere in the **Federal Register** denoting updates to the modified system of records for INTERIOR/DOI-45, Personnel Security Program Files.

Under 5 U.S.C. 552a(k), the head of a Federal agency may promulgate rules to exempt a system of records from certain provisions of the Privacy Act. In this notice of proposed rulemaking, DOI is proposing to exempt portions of the system from certain provisions of the Privacy Act pursuant to 5 U.S.C. 552a(k)(1), (k)(2), (k)(3), (k)(5) and

(k)(6) due to criminal, civil, and administrative law enforcement requirements. DOI is proposing to revise the Privacy Act regulations at 43 CFR 2.254 to add a new paragraph (f) for records maintained in connection with testing and examination material that are exempt under 5 U.S.C. 552a(k)(6) and to claim additional exemptions under the Privacy Act pursuant to 5 U.S.C. 552a(k)(1), (k)(2), (k)(3), and (k)(5) as described in this document.

Because this system of records contains material that support activities related to investigations, adjudication, continuous vetting, and national security purposes under the provisions of 5 U.S.C. 552a(k)(1), (k)(2), (k)(3), (k)(5) and (k)(6), DOI proposes to exempt portions of the Personnel Security Program Files system from one or more of the following provisions: 5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(1) through (e)(3), (e)(4)(G) through (e)(4)(I), (e)(5), (e)(8), (f), and (g). Where a release would not interfere with or adversely affect investigations, reveal investigatory material compiled for law enforcement purposes, reveal investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, or affect national security activities, including but not limited to revealing sensitive information or compromising confidential sources, the exemption may be waived on a case-by-case basis. Exemptions from these particular subsections are justified for the following reasons:

1. 5 U.S.C. 552a(c)(3). This section requires an agency to make the accounting of each disclosure of records available to the individual named in the record upon request. Personnel investigations and vetting records may contain classified information or investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2). Release of accounting of disclosures would alert the subjects of an investigation to the existence of the investigation, law enforcement

activity or counterintelligence investigation, and the fact that they are subjects of the investigation, or could disclose classified or confidential information that could be detrimental to national security. The release of such information to the subjects of an investigation would provide them with significant information concerning the nature and scope of an investigation, and could seriously impede or compromise the investigation, endanger the physical safety of confidential sources, witnesses and their families, and lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony.

2. 5 U.S.C. 552a(c)(4); (d); (e)(4)(G) and (e)(4)(H); (f); and (g). These sections require an agency to provide notice and disclosure to individuals that a system contains records pertaining to the individual, as well as providing rights of access and amendment. Personnel investigation and vetting records may contain information classified pursuant to Executive Order, investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2), information pertaining to protective services pursuant to 18 U.S.C. 3056, investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, or testing and examination material used to determine individual qualifications. Granting access to these records in the Personnel Security Program Files system could inform the subject of an investigation of an actual or potential criminal violation of the existence of that investigation, the nature and scope of the information and evidence obtained, of the identity of confidential sources, witnesses, and law enforcement personnel, and could provide information to enable the subject to avoid detection or apprehension. Granting access to such information could seriously impede or compromise an investigation; endanger the physical safety of confidential sources, witnesses, and law enforcement personnel, as well as their families; lead to the improper influencing of witnesses, the

destruction of evidence, or the fabrication of testimony; and disclose investigative techniques and procedures. In addition, granting access to such information could disclose classified, security-sensitive, or confidential information that impact national security or could constitute an unwarranted invasion of the personal privacy of others.

3. 5 U.S.C. 552a(e)(1). This section requires the agency to maintain information about an individual only to the extent that such information is relevant or necessary. The application of this provision could impair investigations and authorized vetting purposes because it is not always possible to determine the relevance or necessity of specific information in the early stages of an investigation or adjudication. Relevance and necessity are often questions of judgment and timing, and it is only after information is evaluated that the relevance and necessity of such information can be established for an investigation or adjudication. In addition, during the course of an investigation, the investigator may obtain information which is incidental to the main purpose of the investigation but which may relate to matters under the investigative jurisdiction of another agency. Such information cannot readily be segregated.

4. 5 U.S.C. 552a(e)(2). This section requires the agency to collect information directly from the individual to the greatest extent practical when the information may result in an adverse determination. During a background investigation or vetting process, it is not always possible or appropriate to collect information from the individual who is the subject of the investigation. The application of this provision could impair investigations and vetting activities by the Department when making suitability, eligibility, fitness, and credentialing determinations. In certain circumstances, the subject of an investigation cannot be required to provide information to investigators, and information must be collected from other sources. Furthermore, it is often necessary to collect information from sources other than the subject of the investigation to verify the accuracy of the evidence collected.

5. 5 U.S.C. 552a(e)(3). This section requires an agency to inform each person whom it asks to supply information, on a form that can be retained by the person, of the authority which the information is sought and whether disclosure is mandatory or voluntary; of the principal purposes for which the information is intended to be used; of the routine uses which may be made of the information; and the effects on the person, if any, of not providing all or any part of the requested information. The application of this provision could provide the subject of an investigation with substantial information about the nature and scope of that investigation, could provide information to enable the subject to avoid detection or apprehension, seriously impede or compromise an investigation, or the fabrication of testimony, and disclose investigative techniques and procedures.

6. 5 U.S.C. 552a(e)(4)(I). This section requires an agency to provide public notice of the categories of sources of records in the system. The application of this provision could provide the subject of an investigation with substantial information about the nature and scope of that investigation, could provide information to enable the subject to avoid detection or apprehension, seriously impede or compromise an investigation, or the fabrication of testimony, and disclose investigative techniques and procedures. Additionally, the application of this section could cause sources to refrain from giving such information because of fear of reprisal, or fear of breach of promise(s) of anonymity and confidentiality. This could compromise DOI's ability to conduct investigations and to identify, detect and apprehend violators.

7. 5 U.S.C. 552a(e)(5). This section requires an agency to maintain its records with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in making any determination about the individual. In collecting information for investigations, vetting, adjudications, or law enforcement purposes, it is not possible to determine in advance what information is accurate, relevant, timely, and complete. Material that may seem unrelated, irrelevant, or

incomplete when collected may take on added meaning or significance as the investigation progresses. The application of this provision could impair investigations and authorized vetting because it is not always possible to determine accuracy, timeliness or completeness of specific information in the early stages of an investigation or adjudication. It is only after information is evaluated that such information can be established as accurate, timely or complete for an investigation or adjudication. The application of this provision during an investigation or vetting process would impose an impracticable administrative burden on the agency.

8. 5 U.S.C. 552a(e)(8). This section requires an agency to make reasonable efforts to serve notice on an individual when any record on the individual is made available to any person under compulsory legal process when that process becomes a matter of public record. Complying with this provision could prematurely reveal an ongoing criminal investigation to the subject of the investigation.

Procedural Requirements

1. Regulatory Planning and Review (E.O. 12866 and E.O. 13563).

Executive Order 12866 provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has determined that this proposed rule is not significant.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on

the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

2. Regulatory Flexibility Act.

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601, et seq., as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-221)). This proposed rule does not impose a requirement for small businesses to report or keep records on any of the requirements contained in this rule. The exemptions to the Privacy Act apply to individuals, and individuals are not covered entities under the Regulatory Flexibility Act. This proposed rule is not a major rule under 5 U.S.C. 804(2). This proposed rule:

- (a) Does not have an annual effect on the economy of \$100 million or more.
- (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
- (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises.

3. Unfunded Mandates Reform Act.

This proposed rule does not impose an unfunded mandate on State, local, or tribal governments in the aggregate, or on the private sector, of more than \$100 million per year. The proposed rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. This proposed rule makes only minor changes to 43 CFR part 2. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 et seq.) is not required.

4. Takings (E.O. 12630).

In accordance with Executive Order 12630, the proposed rule does not have significant takings implications. This proposed rule makes only minor changes to 43 CFR part 2. A takings implication assessment is not required.

5. Federalism (E.O. 13132).

In accordance with Executive Order 13132, this proposed rule does not have any federalism implications to warrant the preparation of a Federalism Assessment. The proposed rule is not associated with, nor will it have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. A Federalism Assessment is not required.

6. Civil Justice Reform (E.O. 12988).

This proposed rule complies with the requirements of Executive Order 12988. Specifically, this rule:

- (a) Does not unduly burden the Federal judicial system.
- (b) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and
- (c) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

7. Consultation with Indian Tribes (E.O. 13175).

In accordance with Executive Order 13175, the Department of the Interior has evaluated this proposed rule and determined that it would have no substantial effects on Federally Recognized Indian Tribes.

8. Paperwork Reduction Act.

This proposed rule does not require an information collection from 10 or more parties and a submission under the Paperwork Reduction Act (44 U.S.C. 3501, et seq.) is not required.

9. National Environmental Policy Act.

This proposed rule does not constitute a major Federal Action significantly affecting the quality for the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321, et seq., is not required because the proposed rule is covered by a categorical exclusion. We have determined the proposed rule is categorically excluded under 43 CFR 46.210(i) because it is administrative, legal, and technical in nature. We also have determined the proposed rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

10. Effects on Energy Supply (E.O. 13211).

This proposed rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

11. Clarity of this Regulation.

We are required by Executive Order 12866 and 12988, the Plain Writing Act of 2010 (Pub. L. 111-274), and the Presidential Memorandum of June 1, 1998, to write all proposed rules in plain language. This means each proposed rule we publish must:

- Be logically organized;
- Use the active voice to address readers directly;
- Use clear language rather than jargon;
- Be divided into short sections and sentences; and
- Use lists and tables wherever possible.

List of Subjects in 43 CFR Part 2

Administrative practice and procedure, Confidential information, Courts, Freedom of Information Act, Privacy Act.

For the reasons stated in the preamble, the Department of the Interior proposes to amend 43 CFR part 2 as follows:

PART 2 - - FREEDOM OF INFORMATION ACT; RECORDS AND TESTIMONY

1. The authority citation for part 2 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a, 553; 31 U.S.C. 3717; 43 U.S.C. 1460, 1461.

2. Amend § 2.254 by adding new paragraphs (b)(2), (c)(20), (d)(2), (e)(7), and add new paragraph (f) to read as follows:

§ 2.254 - Exemptions.

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(b) *Classified records exempt under 5 U.S.C. 552a(k)(1).*

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(2) INTERIOR/DOI-45, Personnel Security Program Files.

(c) *Law enforcement records exempt under 5 U.S.C. 552a(k)(2).*

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(20) INTERIOR/DOI-45, Personnel Security Program Files.

(d) *Records maintained in connections with providing protective service exempt under 5 U.S.C. 552a(k)(3).*

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(2) INTERIOR/DOI-45, Personnel Security Program Files.

(e) *Investigatory records exempt under 5 U.S.C. 552a(k)(5).*

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(7) INTERIOR/DOI-45, Personnel Security Program Files.

(f) *Records maintained on testing and examination material exempt under 5 U.S.C. 552a(k)(6).* Pursuant to U.S.C. 552a(k)(6), the following systems of records have been exempted from paragraphs (c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (f) of 5 U.S.C. 552a and the provisions of the regulations in this subpart implementing these paragraphs.

(1) INTERIOR/DOI-45, Personnel Security Program Files.

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Signed: _____

Teri Barnett,
Departmental Privacy Officer,
Department of the Interior.

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